IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 967 of 1993

WITH

CRIMINAL APPEAL No 984 of 1993

WITH

CRIMINAL APPEAL NO. 985 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ZAKIRBHAI NURMOHMAD VORA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 967 of 1993

MRS SHILPA J UNWALLA for Petitioners

MR. DF AMIN for Appellant no. 3 in Criminal Appeal No. 985 of 1993.

MR DP JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. On a trial held by the Ld. Addl. Sessions Judge, Nadiad in Sessions Case No. 48 of 1992 the sole appellant in Criminal Appeal No. 967/1993 as well as two appellants in Criminal Appeal No. 984/1993 and three appellants in Criminal Appeal No. 985/1993 have been convicted by the judgment dated July 3, 1993, of the offences punishable under Sections 147, 148, 302 read with section 149 of the Indian Penal Code and Section 135 of the Bombay Police Act and punished with RI for life and fine of Rs.1,000/- in default RI for six months for the offence punishable u/S. 302 read with section 149 of the Indian Penal Code as well as RI for twelve months and fine of Rs.200/-, in default RI for one month for the offence punishable u/S. 148 of the Indian Penal Code and RI for four months and fine of Rs.100/-, in default RI for 15 days for the offence punishable u/S. 135 of the Bombay Police Act. As all the three above numbered appeals are directed against common judgment dated July 3, 1993 rendered by the Ld. Addl. Sessions Judge, Nadiad, in Sessions Case No. 48/1992 and as common questions of facts and law arise for our determination in these appeals, we propose to dispose them of by this common judgment.

2. Witness Jayantibhai Ambalal Patel, who is complainant in this case is resident of Shekhadi, which is situated in Navapura area of Petlad town. The name of his elder brother was Hasmukhbhai Ambalal, whereas name of his another brother was Navinbhai. Hasmukhbhai was married to Ramaben, who was before her marriage, residing in Arjanpara of Petlad town and name of brother of Ramaben was Hasmukhbhai Bhaijibhai, who was residing in Arjanpara of Petlad town. Hasmukhbhai was serving in Shyam Prakash mill and was going to mill on cycle for the purpose of discharging duties in Shyam Prakash mill. The incident in question had taken place on June 15, 1991. On that day polling for Parliamentary election was scheduled to take place in Petlad town. According to complainant Jayantibhai, his brother Hasmukhbhai while

leaving for mill had informed him that he would come back to the house at about 3-00 to 3-30 p.m. after casting vote. What was claimed by Jayantibhai was that Hasmukhbhai did not return home by 3-00 to 3-15 p.m. and, therefore, he in the company of his nephew Rameshbhai had gone on a scooter to make a search about Hasmukhbhai. The case pleaded by Jayantibhai is that the scooter was being driven by Rameshbhai, whereas he was pillion rider. According to the complainant, when he in the company of Rameshbhai had come near Taiwada, six persons belonging to Muslim community had stopped the scooter and that he was knowing all those six Muslims. What is claimed by the complainant is that six Muslims who had stopped the scooter were (1) Shahbuddin Zahruddin Shaikh, (2) Najimuddin Zahiruddin Kazi, (3) Iminmiya Zahruddin Kazi, (4) Zakirbhai Nurmohmed Vora, (5)Jamirullakhan Mujfarullakhan Pathan and (6) Isubmiya Ahmedmiya Shaikh. According to the complainant Shahbuddin Zahruddin had a stick with him, whereas Najimuddin Zahiruddin had a Dhariya with him and Iminmiya was armed with a sword, whereas Zakirbhai Nurmohmed was armed with a razor and Jamirullakhan alias Nijammiya Mujfarullakhan was armed with a stick. The case of the complainant is that the scooter driven by his nephew Rameshbhai was stopped by the six convicted appellants on belief that he and his nephew were members of Bharatiya Janata Party. The claim made by the complainant is that after getting the scooter halted, the appellants had mounted an attack on his nephew with Dhariya, sword, pipe and sticks, whereas after alighting from the scooter he was standing at a distance. According to Jayantibhai, his nephew as well as he had raised shouts to save and had started running towards Arjanpara and Babubhai Ambalal, Ravjibhai Javerbhai, Somabhai Ashabhai, Nagarbhai Ranchhodbhai and Girdharbhai who were standing near the entrance of Arjanpara had come to their rescue on hearing shouts. According to the complainant, on seeing Babubhai Ambalal and others coming to their rescue, the convicted appellants had run away with their respective weapons from the place of incident. It is the case of the complainant that thereafter he had gone near Rameshbhai, who had fallen down and found that Rameshbhai had sustained sword blow and Dhariya blow on his head as well as razor blow on right leg and had also sustained razor blow on right hand. According to this witness, he had found that his nephew had also sustained blow given by razor on right side of the neck and that he had noticed that his nephew had died on the spot. Meanwhile a police van had arrived at the place of incident and deceased Rameshbhai was removed to S.S. Hospital, Petlad in the said van. Thereafter, the complainant had gone to

Petlad Police Station where complaint lodged by him was registered by Mr. R.A. Solanki, who was then Police Inspector of Petlad Police Station. The information about commission of cognizable offence lodged by complainant Jayantibhai was registered as C.R. No. 102/1991 and offences punishable under Sections 147, 148, 302 read with sec. 149 of the Indian Penal Code and section 135 of the Bombay Police Act were registered against the convicted appellants. After registering the offences, necessary investigation into the case was made by P.I. Mr. Solanki. He had recorded statements of those persons who were found conversant with the facts of the case and had also prepared panchnama of place of occurrence in presence of independent witnesses. Further, during the course of investigation the convicted appellants were arrested and different weapons which were used in commission of crime were discovered pursuant to voluntary disclosure made by them. The Investigating Officer had made necessary arrangement for sending the dead body of deceased Rameshbhai for post mortem examination and incriminating articles which were seized during the course of investigation were sent to Forensic Science Laboratory for analysis. After ascertaining the cause of death of the deceased and obtaining the report of the Serologist and on completion of investigation, the convicted appellants were chargesheeted of the offences punishable u/Ss. 147, 148, 302 read with section 149 of the Indian Penal Code and section 135 of the Bombay Police Act in the court of the Ld. Judicial Magistrate First Class, Petlad. As the offence punishable u/S. 302 of the Indian Penal Code is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Nadiad for trial where it was numbered as Sessions Case No. 48/1992.

3. The charge at Exh. 2 was framed against the convicted appellants of the offences punishable u/Ss. 147, 148, 302 read with 149 of the Indian Penal Code and section 135 of the Bombay Police Act. The charge was read over and explained to the appellants who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Jayantibhai Ambalal Patel P.W.1 Exh. 16 (2) Dr. Dattatrey Radhakrushna Khadayate P.W.2 Exh. 17 (3) Babubhai Ambalal P.W.3 Exh. 19, (4) Ravjibhai Javerbhai P.W. 4 Exh. 21, (5) Mangalbhai Desaibhai P.W. 5 Exh. 22, (6) Arunbhai Jatubhai P.W.6 Exh. 30, (7) Janakbhai Desaibhai P.W.7 Exh. 37, (8) Mohanbhai Desaibhai P.W. 8 Exh. 39, (9) Dineshkumar Chaturbhai P.W. 9 Exh. 9, (10) Dominet Pomasbhai Vaghela P.W. 10 Exh. 48, (11) Madhuben Kantilal P.W. 11 Exh. 52, (12) Vijaysinh Laxmansinh

Chauhan P.W. 12 Exh. 55, (13) Ranjitsinh Amarsinh Solanki P.W. 13 Exh.57, to prove its case against the appellants. The prosecution also produced documentary evidence such as post mortem notes of the deceased prepared by doctor Khadayate at Exh. 18, panchnama of place of occurrence at Exh.23, inquest panchnama at Exh. 31, report of the Serologist at Exh. 33, notification issued by the competent authority u/S. 37(1) of the Bombay Police Act at Exh. 34, different discovery panchnamas prepared u/S. 27 of the Indian Evidence Act, complaint lodged by Jayantibhai at Exh. 54, etc. in support of its case against the appellants. The defence of the appellants was that they were falsely impleaded in the case and in support of their defence, they examined (1) Jerambhai Bhaijibhai Makwana D.W. 1 at Exh. 63 and (2) Tumadu Jinas Patil as D.W. 2 at Exh. 64. After recording of evidence of prosecution witnesses was over, the Ld. Addl. Sessions Judge explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure. In their further statements, the appellants denied the case of the prosecution.

4. On appreciation of evidence adduced by the parties, the Ld. Judge held that it was proved by the prosecution that the deceased had died a homicidal death. According to the learned Judge, the evidence of complainant Jayantibhai Patel as well as that of witness Babubhai and witness Ravjibhai was cogent, consistent as well as trustworthy. The Ld. Judge found that the evidence of complainant Jayantibhai was not only corroborated by evidence of witness Babubhai and witness Ravjibhai, but was also corroborated by the medical evidence on record. Placing reliance on the evidence of complainant Jayantibhai and that of witness Babubhai as well as witness Ravjibhai, the Ld. Judge deduced that it was proved by the prosecution that on the date of the incident, the complainant in the company of his nephew deceased Rameshbhai was going towards Keshav mill in search of his brother Hasmukhbhai and that on the way, the scooter which was being driven by deceased Ramesh was stopped by the convicted appellants and that the appellants had inflicted blows with different weapons as narrated by the witnesses. The Ld. Judge disbelieved the evidence of defence witnesses and held that the case against the appellants was fully established beyond reasonable doubt by evidence of complainant and other witnesses. In view of the above referred to conclusions, the Ld. Judge has convicted the appellants by judgment dated July 3, 1993 and imposed different sentences which

are referred to earlier, giving rise to the three appeals.

5. Ms. Shilpa J. Unwala, learned counsel for the original accused nos. 1 to 5 and Mr. D.F. Amin, learned counsel for the original accused no.6 submitted that the evidence of complainant Jayantibhai Patel is not trustworthy at all and his evidence does not indicate that he had accompanied his nephew on scooter while launching search for his brother Hasmukhbhai or that he had witnessed the incident in question and, therefore, his evidence should not have been relied upon by the Ld. Judge for believing the prosecution case. According to the learned counsel for the convicted appellants, if he had accompanied deceased Rameshbhai on scooter, then in all probability he would not have been spared by the assailants and, therefore, his claim that he was standing near the place of incident and that he had witnessed the whole incident is highly doubtful. What was asserted on behalf of the appellants was that deceased Hasmukhbhai had left home for Keshav mill in the early morning and was to return home after casting vote and, therefore, there was no reason for complainant to go in search of his brother Hasmukhbhai at about 3.00 or 3.30 p.m. on the date of incident as the deceased was stopped to render services for 12 hours beginning from seven o'clock in the morning. The learned counsel after referring to the evidence of complainant Jayantibhai, submitted that his evidence does not indicate that he was knowing that his brother Hasmukhbhai was to return home at about 3.30 p.m. because it is not so stated by him in his complaint lodged before the police and, therefore, his claim that he had gone out in search of his brother Hasmukhbhai at about 3.30 p.m. in the company of his nephew deserves to be disbelieved. The learned counsel for the convicted appellants urged that the evidence of witness Babubhai and witness Ravjibhai Ravjibhai does not show that they in the company of Somabhai and Nagarbhai were standing near the entrance of Arjan Faliya and, therefore, the claim made by the complainant Jayantibhai that on hearing shouts raised by him and deceased Rameshbhai, those who were standing at the entrance of Arjan Faliya had rushed to their rescue should be disbelieved. It was pointed out that as per the testimony of witness Jayantibhai soon after the incident, a police van had arrived at the place of incident, but the evidence of complainant Jayantibhai does not indicate that he had given any information about the incident to the police personnel who were in the van and this unnatural conduct on his part establishes that he in fact had not witnessed the incident at all. The learned counsel further emphasized that this witness had

not gone to hospital with dead body of deceased Rameshbhai and has given false explanation as to why he had not gone to hospital though he had learnt that his brother Hasmukhbhai was also killed in the incident and, therefore, his evidence being of doubtful nature should be rejected by the Court. What was stressed by the learned counsel for the appellants was that the complainant has not attributed specific role to all the accused in his complaint which was filed within two hours of happening of the incident, but has attributed specific role to each appellant in his deposition before the Court which was recorded after a period of about two years and, therefore, there being material improvements in his deposition, his evidence should not be regarded as trustworthy. While pointing out highly unnatural conduct of the complainant, it was stressed that some residents of Arjan Faliya were sitting near the office of agricultural produce market committee, which is near another entrance to Arajan Falia, but complainant Jayantibhai had not made any inquiry about the deceased Hasmukhbhai with them and his claim that other family members had learnt about the death of his brother Hasmukhbhai from him when he had returned his home at about 6 to 6.15 p.m. is also highly doubtful, because the evidence on record indicates that his brother Hasmukhbhai was fatally assaulted at about 3.00 to 3.30 p.m. and Hasmukhbhai Bhaijibhai, who is brother-in-law of deceased Hasmukhbhai and who is resident of Arjanpura must have informed family members of the complainant about the death of deceased Hasmukhbhai within no time. It was further urged that the evidence of witness Babubhai Ambalal shows that he in the company of Ravjibhai was standing near the house of one Babubhai Chhotabhai and were talking inter-se about the election, whereas Somabhai Ashabhai Patel and Nagarbhai Ranchhodbhai Patel were standing opposite the entrance of Arjan Faliya, but the evidence of complainant Jayantibhai does not show that he had made any inquiries either with Babubhai Ambalal or with Ravjibhai or with Somabhai Ashabhai or with Nagarbhai Ranchhodbhai Patel about his brother Hasmukhbhai and thus the conduct of complainant being most unnatural, his claim that he was in the company of deceased Rameshbhai and had witnessed the incident should be disbelieved. After scrutinising the evidence of witness Babubhai and witness Ravjibhai critically, the learned counsel for the appellants submitted that it was not probable that Babubhai and others who were not armed at all would rush towards the direction where according to the complainant, all the appellants were standing with deadly weapons and, therefore, the claim advanced by these witnesses that

they had rushed to the rescue of the deceased and complainant and that they had seen the convicted appellants inflicting blows on the deceased becomes highly improbable. The learned counsel further pleaded that the evidence of witness Babubhai is not fully corroborated by medical evidence on record and as the complainant has narrated the incident in a manner different than narrated by witness Babubhai his testimony should be discarded as untrustworthy. What was highlighted was that just before assault on deceased Rameshbhai, Hasmukhbhai who was real brother of the complainant Jayantibhai was fatally assaulted near Arjan Faliya and, therefore, if witness Babubhai and witness Ravjibhai had spotted the complainant and his nephew going towards Keshav mill, in all probability they would have stopped them and would not have permitted them to go towards Taiwada where deceased Rameshbhai was fatally wounded and, therefore, the whole case of the prosecution becomes doubtful. Further it was claimed that the evidence of witness Babubhai does not show that he had gone either to hospital or to police station nor his evidence shows that he had informed any one in the locality of Arjan Faliya about the fatal assault mounted either on Hasmukhbhai who is brother of complainant Jayantibhai or on the deceased Rameshbhai and, therefore, the learned Judge committed error in placing reliance on the deposition of witness Babubhai for believing the prosecution case against the appellants. The learned counsel further pointed out that witness Ravjibhai had stated in his police statement that 5 to 6 blows with sticks were given to deceased Rameshbhai whereas he has not referred to such blows having been given on the deceased at all in his substantive evidence before the Court and, therefore, in view of major contradictions appearing in his evidence, his evidence should not have been acted upon for convicting the appellants of major offences. While offering comments on the evidence of witness Ravjibhai it was argued that he had not accompanied the complainant either to police station or hospital and as his evidence is not materially corroborated by medical evidence on record, his evidence should also be disbelieved. The learned counsel contended that it is not uncommon in cases of communal nature to find witnesses coming forward to depose falsely about an attack by person who is believed to be guilty and, therefore, having regard to the nature of evidence adduced by the prosecution, a reasonable benefit of doubt deserves to be given to the convicted appellants and the appeals should be accepted.

6. Mr. D.P. Joshi, Ld. APP for the prosecution

contended that the evidence of complainant Jayantibhai is corroborated by evidence of witness Babubhai as well as witness Ravjibhai in material particulars and, therefore, it cannot be said that any error is committed by the Ld. Judge in placing reliance on the sworn testimony of complainant for the purpose of believing prosecution case against the appellants. The learned counsel for the State pleaded that the evidence of witness Jayantibhai, witness Babubhai and witness Ravjibhai is also corroborated in material particulars by the medical evidence on record and, therefore, it is safe to rely upon their evidence for the purpose of upholding case of the prosecution against the appellants. What was claimed was that there are minor contradictions in the evidence of prosecution witnesses, but they are neither material nor do they go to the root of the prosecution case and, therefore, the minor contradictions appearing in the evidence of prosecution witnesses should not be blown out of proportion upon for the purpose of disbelieving them. According to the Ld. APP the witnesses themselves must be in a state of shock on seeing attack being mounted on deceased Rameshbhai and, therefore, discrepancies which have appeared in their evidence should not be viewed seriously more particularly when power of observation differs from person to person. The Ld. APP for the State highlighted that cogent reasons have been assigned by the Ld. Judge of the trial Court who had advantage of observing demeanor of the witnesses for convicting the appellants and the evidence which has inspired confidence of the Ld. Judge before whom the trial was conducted should be believed while upholding the conviction of the appellants. It was urged that no case is made out by the learned counsel for the appellants to interfere with well reasoned judgment convicting the appellants under different offences and, therefore, the appeal should be dismissed.

7. We have considered the submissions advanced at the bar and reappreciated the whole evidence on record.

8. The fact that deceased Rameshbhai had died a homicidal death is not in dispute. The evidence of Dr. Dattatrey Khadayate P.W. 2 Exh.17 shows that on June 15, 1991 he was discharging duties as Medical Officer, S.S. Hospital, Petlad and that he had received the dead body of deceased Rameshbhai Patel at about 8-15 p.m. for post mortem examination. The Medical Officer in his evidence has stated that alongwith the dead body a Yadi was brought by Police Constable Kodarbhai of Petlad Town Police Station and Yadi was accompanied with inquest panchnama. According to the Medical Officer, as it was

too late on June 15, 1991, he had performed autopsy on the dead body on June 16, 1991 at about 9-45 a.m. and completed the same at about 11.00 a.m. The Medical Officer has stated that on post mortem examination he had found elevan external injuries and four internal injuries. According to him, internal injuries were corresponding to external injuries nos. 1, 2, 4, 5 and 6 and that external injuries nos. 1 to 4 were possible by sharp cutting instrument, whereas other injuries were possible by hard and blunt substance. The Medical Officer was shown the razor which was produced on the record of the case as Muddamal article no. 13 and after seeing the razor the Medical Officer opined that external injury no. 3 was possible by the said razor, whereas external injuries nos. 1, 2 and 4 were possible by Dhariya and sword which were produced as Muddamal articles nos. 12 and 14 respectively on the record of the case. According to the doctor, external injuries nos. 5, 6 and 7 to 11 were possible by Muddamal article no. 16 which was an iron pipe as well as Muddamal article no. 17 which was a stick. The Medical Officer has clearly stated that external injuries nos. 1, 2, 4, 5 and 6 were sufficient in the ordinary course of nature to cause the death of the deceased. The evidence of the doctor stands corroborated by contemporary record prepared by him, namely post mortem notes which are produced on the record of the case at Exh. 18. In the post mortem notes also the injuries which were found on the deceased while performing the post mortem examination are enumerated in detail. Further from the evidence of Medical Officer and post mortem notes, it is evident that the cause of the death of the deceased was head injury. The injuries which were sustained by the deceased are also enumerated in detail in inquest panchnama Exh. 31, which stands proved through the evidence of witness Arunbhai Janubhai P.W.6 Exh.30. The evidence of witness Arunbhai stands amply corroborated by the evidence of Investigating Officer. It is not the case of any of the appellants that the death of the deceased was either accidental or suicidal. Having regard to the facts of the case, we are of the opinion that the Ld. Judge did not commit any error in holding that it was proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death. The said finding being eminently just, is hereby upheld.

9. As observed earlier, the case of the prosecution against the appellants rests on the evidence of complainant Jayantibhai and witness Babubhai as well as witness Ravjibhai and, therefore, it would be relevant to scrutinise their evidence in detail. Witness Jayantibhai

Ambalal Patel P.W.1 Exh. 16 is resident of Shekhadi which is situated in Navapura area of Petlad town. The name of his eldest brother was Hasmukhbhai, whereas name of his nephew was Rameshbhai. The witness has stated in his evidence that his brother Hasmukhbhai was married to one Ramaben who was residing in Arjanpura area of Petlad town and that Hasmukhbhai Bhaijibhai, who is brother-in-law of his deceased brother Hasmukhbhai was residing in Arjan Faliya. The witness has mentioned in his substantive evidence before the Court that the incident had taken place on June 15, 1991 and that on that day polling for Lok Sabha election was to take place. According to this witness, his deceased brother Hasmukhbhai was serving in Shyam Prakash Mill and that while leaving for mill his brother had informed him that he would return home at about 3.00 to 3.30 p.m. after casting vote. What is claimed by this witness is that his brother Hasmukhbhai did not return home by 3.00 to 3.15 p.m. and, therefore, he in the company of his nephew Rameshbhai had gone out in search of his brother Hasmukhbhai on a scooter. According to this witness, the scooter was being driven by his nephew Rameshbhai, whereas he had occupied the pillion seat. The witness has stated in his evidence that when they had come near Taiwada which is at a distance of 20 ft. from Arjan Faliya, the appellants had stopped the scooter and that the appellant no. 1 in Criminal Appeal No. 985/1993 was armed with a stick, whereas the appellant no. 2 in Criminal Appeal No. 984/1993 had Dhariya with him and the appellant no. 1 in Criminal Appeal No. 983/1993 had sword with him, whereas the sole appellant in Criminal Appeal No. 967/1993 had razor with him and the appellant no. 2 in Criminal Appeal No. 985/1993 was armed with an iron pipe and the appellant no. 3 in Criminal Appeal No. 985/1993 had a stick with him. According to this witness, after the scooter was stopped, he had got down from the scooter and that the appellants had started assault on deceased Rameshbhai. The witness has claimed before the Court that all the appellants had inflicted blows on deceased Rameshbhai with their respective weapons and that he was standing just near the place of incident. The witness has further claimed in his evidence that deceased Rameshbhai as well as he had raised shouts while running towards Arjanpara and that Babubhai Ambalal, Ravjibhai Javerbhai, Somabhai Ashabhai, Nagarbhai Ranchhodbhai, who were standing near the entrance of Arjan Faliya had come to their rescue on hearing the shouts. According to this witness, all the appellants had mounted attack on the deceased and had inflicted the blows on him. It is the case of the complainant that on seeing Babubhai and others coming to

their rescue, the appellants had run away from the scene of offence with their weapons and that he had found that Rameshbhai had sustained Dhariya blow and sword blow on his head as well as blow by razor on his leg and another blow by razor on his right hand. According to this witness, he had also noticed blow which could have been caused by razor on right side of the neck of deceased Rameshbhai and that Rameshbhai had died on the spot. The witness has stated before the Court that meanwhile a police van had come and the deceased was removed to S.S. Hospital, Petlad in the said van and that thereafter he had gone to Petlad police station and lodged complaint. The witness has identified the weapons which were seized during the course of investigation and which were used by the appellants in the commission of crime. The witness has claimed in his testimony that the appellants belonged to Congress-I party and that the deceased was assaulted on the belief that he was a member of Bhartiya Janata Party. In his cross-examination, the witness has stated that the time of the shift in which his brother Hasmukhbhai was working was from 7.00 in the morning to 6.00 p.m. and that normally his brother was returning home between 6 p.m. to 7 p.m. The witness had admitted that after the complaint was lodged, the same was read over to him and that as he had suspicion about the name of one of the accused, he had got it corrected subsequently. The witness has admitted that he had not stated either in his complaint or in his police statement that his brother had informed him that he would return home at about 3 to 3.30 p.m. The witness has also stated that from Shekhadi he had gone to Janda Bazar and after reaching Janda Bazar, he was going towards Arjanpara in the company of the deceased for searching his brother Hasmukhbhai because way from Shekhadi to Kalal Pipar is congested one. The witness has admitted that the way to Keshav mill through the narrow deep lane situated near agricultural produce market committee was short one and was less congested, but he had selected route through Janda Bazar for the purpose of going towards Arjanpara. According to this witness, some persons who were residents of Arjan Faliya were sitting at the booth which was erected near agricultural produce market committee and they were known to him and that they were also known to his deceased brother Hasmukhbhai. The witness has claimed that till they had reached Taiwada, they had no information about his brother Hasmukhbhai. The witness has informed the Court that the entrance of Arjan Faliya abuts on the road whereas Arjan Faliya itself is situated inside, but has denied the suggestion that it was not possible for those standing on a Ota from Arjan Faliya to see the place of incident. The witness has admitted that

he had not stated in his complaint that Babubhai, Ravjibhai, Somabhai and Nagarbhai had come running to his rescue from Arjan Faliya. The witness has further admitted that he had not stated in his police statement that Babubhai, Ravjibhai, Somabhai and Nagarbhai were standing near the entrance of Arjan Faliya and had come running to his rescue. The witness also admitted that deceased Rameshbhai was serving in Keshav mill and the timings of the shift in which deceased was working was from 7.00 a.m. to 3.30 p.m. The witness has admitted that on the date of incident Shyam Prakash mill and Keshav mill were working and the shift in both the mills was starting at 7.00 a.m. and was getting over at 3.30 p.m. The witness has further admitted that Hasmukhbhai would not have reached Shekhadi before 4.00 p.m. if he had left the mill at about 3.30 p.m. The witness on his own has stated that deceased Hasmukhbhai was Engineer and was required to serve for 12 hours and that there was no fixed time for him for leaving the mill. The witness has also admitted that on the next day of incident, he had met Hasmukhbhai Bhaijibhai, who is brother-in-law of deceased Hasmukhbhai and that on the date of incident he had gone to the police station at about 5.00 p.m. The witness has informed the Court in his cross-examination that after he had lodged complaint regarding death of deceased Rameshbhai, he had learnt that his brother Hasmukhbhai was fatally wounded and had expired. The claim advanced by this witness in his cross-examination is that after lodging complaint regarding death of deceased Rameshbhai, he had returned to his home and informed Babubhai Somabhai about the deaths of Rameshbhai and his brother Hasmukhbhai. The witness has also claimed that he did not know as to who had lodged complaint regarding death of his deceased brother Hasmukhbhai. The claim made by this witness in cross-examination is that after lodging complaint regarding death of deceased Rameshbhai, he had reached his house at about 6 to 6.15 p.m. and he was sitting in his street with Prafulbhai and Babubhai because his brother as well as his nephew had died. The witness has denied the suggestion made by the defence that he was knowing that on the date of incident communal riots had taken place in Arjan Faliya and Janda Bazar area of Petlad town. According to this witness, the razor was not pierced through the body of Ramesh, but blows with razor were inflicted on him. The witness has admitted that he had not informed the police personnel about the incident when police van had come at the place of incident. The witness has also admitted that he had not stated in his complaint and police statement that both he and deceased Ramesh had started running on assault being

mounted on deceased Rameshbhai. In cross-examination also the witness has maintained that the appellants were inflicting blows with their respective weapons with great force and that the deceased was surrounded by the appellants. The witness has denied that he had not gone in the company of Rameshbhai from Shekhadi in search of his brother. He has also denied the suggestion that he had learnt about the death of his nephew Rameshbhai at village Shekhadi and that he was not present at the time of incident. Further the witness has stated that he had learnt about the death of his brother Hasmukhbhai at village Shekhadi at about 6.30 to 7.00 p.m. when necessary information was conveyed by Prafulbhai and, therefore, he in the company of Prafulbhai had gone to Petlad town. The witness has denied the suggestion that after casting vote he had learnt at about 11.00 a.m. that one person had lost life in police firing and as he had known that communal riots had taken place, he had not gone to Petlad at all. The witness has further mentioned in his cross-examination that even after seeing the appellants standing with arms from a distance, they had not felt that they should not proceed further. The witness has admitted that none of the appellants had assaulted him and that none of the appellants had any altercation with him. The witness has admitted that at the time when deceased Rameshbhai was assaulted he was standing just near the place of incident.

10. On reappreciation of evidence of the complainant we are of the opinion that his evidence is not only full of material contradictions and highly improbable, but his evidence does not inspire the confidence of the Court at all. As observed earlier the witness has admitted in his evidence that his brother Hasmukhbhai was serving in Prakash mill and that he was required to serve in the mill for 12 hours as he was an Engineer. The mill starts at about 7.00 a.m. and, therefore, normally before 7.00 p.m. there was no reason for deceased Hasmukhbhai to return home. Under the circumstances, the claim made by the witness that his brother had told him that he would return home at about 3.00 to 3.30 p.m. after casting vote becomes highly doubtful, particularly when this fact is not stated by the witness in his complaint. The claim of the witness that he had accompanied deceased Rameshbhai while searching Hasmukhbhai does not inspire confidence of the Court. It is relevant to notice that the claim of this witness is that the deceased and he were on the same scooter and it is not probable that the appellants who were armed with deadly weapons would spare the witness while carrying out murderous assault on deceased Rameshbhai. The evidence of the complainant

does not indicate that the deceased Rameshbhai was assaulted because of some personal dispute between him and the appellants and there is no manner of doubt that deceased Rameshbhai was murdered in a communal riot where the target of one community was member of another community. Under the circumstances, it is not probable that the complainant would not be assaulted at all though according to him he was accompaning deceased Rameshbhai and that only deceased Rameshbhai was assaulted by the appellants. At this stage, it would be relevant to notice the topography of the area in which the incident is alleged to have taken place. From the evidence of complainant Jayantibhai, witness Dominet Vaghela P.W. 10 Exh. 48, who has prepared map of place of incident and the Investigating Officer, it becomes evident that if one proceeds from village Shekhadi towards Kalal Pipar, one would come across agricultural produce market committee and after leaving some distance, there is a deep lane leading towards Arjan Faliya. Thereafter, Kalal Pipar is situated and to the north of Kalal Pipar there is Keshav mill and on way to Keshav mill comes the main entrance of Arjan Faliya and just at a distance of twenty feet the place where the incident is alleged to have taken place is located. The evidence of complainant Jayantibhai establishes that he had seen residents of Arjan Faliya sitting at the booth which was erected near agricultural produce market committee, but his evidence does not disclose that he had made any inquiries with any of them about his deceased brother Hasmukhbhai. Further his case that from Kalal Pipar he had gone to the place where the incident had taken place also becomes highly doubtful because on his own say witness Babubhai Ambalal, witness Ravjibhai Javerbhai and others were standing near the entrance of Arjan Faliya and they would have prevented the complainant and deceased Rameshbhai from proceeding further in the direction of Taiwada. However, the evidence of complainant Jayantibhai does not indicate that he had any talk with any one who was standing near the entrance of Arjan Faliya. Moreover, the claim made by this witness that even though he had seen the appellants standing with arms, he had not thought it fit not to proceed further does not inspire confidence. If an unarmed person belonging to one community sees the persons belonging to another community armed with deadly weapons, then the natural human would be not to proceed in that direction. Further the evidence of complainant Jayantibhai establishes that deceased Rameshbhai was serving in Keshav mill and that the timings of his shift were from 7.00 a.m. to 3.30 p.m. The evidence on record establishes that though on that day polling was to take place for parliamentary election, Keshav mill was working

and, therefore, the defence case that deceased Rameashbhai had gone to attend the duty in mill and was returning all alone on his scooter at about 3.30 p.m. when he was assaulted by members of another community appears to be probable. In such circumstances, it becomes highly doubtful whether in fact complainant Jayantibhai had witnessed the incident in question or not. His case that he had gone home at about 6.00 to 6.15 p.m. straight from police station and informed the inmates of his house about the deaths of his brother Hasmukhbhai and nephew Rameshbhai is also highly improbable in as much as in para. 25 of his deposition the witness has clearly stated that he had learnt about the death of his brother Hasmukhbhai at about 6-30 to 7-00 p.m. when he was at village Shekhadi and that necessary information regarding death of his brother was conveyed to him by Prafulbhai. It is relevant to notice that though the witness claims that he had lodged the complaint about the incident within two hours, he had not attributed specific role to each appellant as is ascribed by him in his evidence before the Court which was recorded after a period of two years. This probalises the claim of the learned counsel for the apellants that the complainant had materially improved his version before the Court by ascribing specific role to each appellant after perusing the inquest panchnama and the post mortem notes. Moreover, the claim of the witness that one of the appellants had caused injuries on leg and hand of deceased by means of razor does not stand corroborated by medical evidence. The claim of the witness that several stick blows were given to the deceased is also not borne out from the medical evidence on record, because the doctor has not ruled out the possibility of some injuries having been caused on account of dragging. Normally in a criminal case it is the duty of the Court to separate truth from falsehood and accept that part of the evidence which is found to be truthful because the maxim false in uno falsus in omnibus is not applicable in India. It is well settled that in sifting the evidence, the Court has to separate chaff from the grain and Court cannot abandon the attempt on the ground that the case is baffling. However, we find that the evidence of the complainant is confusing as well as conflicting. The doctrine of separation of grain from chaff will apply when grain is separable from the chaff. However, when the truth and falsehood are so inextricably mixed up, that in the process of separation, the Court will have to reconstruct an absolutely new case for the prosecution by diverting the essential details of the prosecution case completely from the context, then the principle does not apply. So far as the evidence of

Jayantibhai is concerned, we find that the truth and falsehood in his evidence are so intermingled that it is impossible to separate them and, therefore, his evidence will have to be rejected in its entirety. Thus, the evidence of the complainant is of little help to the prosecution in proving its case against the appellants.

11. Coming to the evidence of witness Babubhai, we find that he was serving in textile mill taken over by N.T.C. and that the said mill was not working on the date of incident as polling for parliamentary elections was scheduled to take place. According to this witness, he had gone for casting vote and that at about 2.30 to 3.00 p.m. he was standing in the company of witness Ravjibhai near the house of one Babubhai Chhotabhai, whereas Somabhai Ashabhai Patel and Nagarbhai Ranchhodbhai Patel were standing opposite the entrance of their Arjan Faliya. The witness has stated in his deposition that at about 3.15 p.m. deceased Rameshbhai and complainant Jayantibhai of village Shekhadi had passed quite near from them and they had gone towards Taiwada where the appellants were standing with different weapons in their hands and that the deceased was assaulted by the appellants with their respective weapons. According to this witness, first of all the appellant no. 2 in Criminal Appeal No. 985/1993 had given pipe blow on the head of the deceased, but as deceased had bent forward, the blow had struck on back part of his head and, therefore, the deceased after throwing the scooter on the ground had run towards Arjan Faliya. The witness has further stated that the appellants had chased deceased Rameshbhai and near a light pole he was fatally wounded by the appellants with different weapons. According to this witness, on seeing assault on deceased, he, Ravjibhai, Somabhai and Nagarbhai had gone towards the direction where the deceased was assaulted and all of them had found that the deceased had sustained injuries on different parts of his body and that he had expired on the spot. According to this witness, on seeing him and other persons belonging to Arjan Faliya approaching towards the deceased, the appellants who were armed with deadly weapons had run away with their weapons. In his cross-examination the witness has stated that he had not stated in his police statement that original accused nos. 5 and 6 had given stick blows on the head of the deceased, but had stated that the stick blows were given by them on the leg of the deceased. According to him, at the time of incident only four persons belonging to Arjan Faliya were standing on the road and that he had not seen any other person on the road. On reappreciation of his evidence, we find that

the witness is not trustworthy at all. The witness has admitted that though the police van had come at the place of incident, he had not informed any police personnel about the incident and that the police had made inquiries with complainant Jayantibhai, which is not even the claim of complainant Jayantibhai before the Court. The witness has admitted that the police had made inquiries with him about the scooter and that he was handed over custody of the scooter on the next day, but admittedly this witness had not stated anything about the incident to the police personnel though inquiry was made by them about the scooter. His evidence makes it evident that he had not witnessed the incident at all, otherwise he would not have failed to narrate the incident in question to the police personnel or informed them that he was an eye witness because on his own say inquiries were made by the police personnel about the scooter. A bare reading of the evidence of this witness makes it abundantly clear that he had no occasion to see the incident in question at all. His evidence in material particulars stands contradicted by the medical evidence on record and suffers from inherent improbabilities. His evidence would indicate that the distance between Arjan Faliya and place where incident had taken place is hardly 20 ft. and his claim that only four persons of Arjan Faliya were standing near the entrance of Faliya though the appellants were armed with deadly weapons seems to be highly improbable. His claim that he and three others had rushed to the help of complainant unarmed also does not inspire confidience. So also the claim advanced by this witness that on seeing him and three others of Arjan Faliya approaching the deceased, the appellants had run away with their respective weapons is also highly doubtful. In fact deceased Hasmukhbhai was murdered near the office of agricultural produce market committee and, therefore, none of the residents of Arjan Faliya would come on the road and talk about election, more particularly when the appellants were allegedly standing with deadly weapons in their hands and that too hardly at a distance of 20 ft. On overall view of the evidence of this witness, we are satisfied that his evidence does not have a ring of truth and it is not safe to rely upon his evidence for the purpose of convicting the appellants. Similar infirmities are to be found in the evidence of another so called eye witness Ravjibhai Javerbhai P.W.4 Exh. 24 and his evidence is also not trustworthy. We may say that this witness has given deposition on the same line as is given by witness Babubhai Ambalal and, therefore, we do not think it necessary to discuss his evidence in detail and assign the reasons for discarding the same. We may state that during the course of

investigation, different discovery panchnamas were prepared u/S. 27 of the Indian Evidence Act indicating that pursuant to voluntary disclosures made by the concerned appellant the weapon of offence used by him was discovered. However, none of the weapons were found to be blood stained at all and the report of the Serologist in no way helps the prosecution.

12. As observed earlier, the entire case of the prosecution rests on the evidence of three witnesses whose evidence is discussed by us in detail and whose evidence is not found to be reliable at all for the purpose of upholding the conviction of the appellants recorded by the Ld. Judge. It is true that deceased Rameshbhai had died an unfortunate death, but the prosecution has not led any cogent and reliable evidence to establish that the death of the deceased was caused by all the appellants or any of them. It is not uncommon in case of communal nature to find witnesses coming forward to depose falsely about an attack by person who is believed to be guilty. As the participation of the appellants in the occurrence is not established beyond reasonable doubt, we are of the opinion that a reasonable benefit of doubt deserves to be given to the appellants. Thus, the impugned judgment is liable to be set aside.

13. For the foregoing reasons, all the three appeals succeed. The judgment dated July 3, 1993 rendered by the Ld. Addl. Sessions Judge, Nadiad in Sessions Case No. 48/1992 convicting the appellants of the offences punishable under Sections 147, 148, 302 read with sec. 149 of the Indian Penal code as well as u/s. 135 of the Bombay Police act and sentence imposed are hereby set aside.

The record of the case indicates that the appellant no. 1 and appellant no. 3 in Criminal appeal No. 985 of 1993 are absconding. Therefore, those appellants who are in jail are directed to be released forthwith unless their presence is needed with reference to any other case. The record of the case makes it manifest that after the judgment was delivered by the Ld. Addl. sessions Judge, Nadiad on July 3, 1993 all the appellants were taken into custody including the appellant nos. 1 and 3 in criminal Appeal No. 985/1993. The record also shows that the appellant no. 1 in Criminal appeal No. 985/1993 i.e. Shahbuddin Zahruddin was granted furlough by I.G. Prison on June 2, 2000 and since then he is absconding, whereas the appellant no. 3 in Criminal Appeal no. 985/1993 i.e. Isubmiya Ahmedmiya

Shaikh was granted parole by the competent authority on May 26, 1994 and is absconding since then. There is no manner of doubt that above referred to two appellants have escaped from lawful custody and therefore, committed offence described in Section 224 of the Indian Penal Code. Under the circumstances, the Police Officer incharge of Petlad Police Station is directed to apprehend those two appellants and prosecute them for the offence punishable u/S. 224 of the Indian Penal Code immediately.

Subject to above referred to directions, the appeals are allowed.

Muddamal articles to be disposed of in terms of the directions given by the Ld. Judge in the impugned judgment.

[J.M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.